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Nos. 85-93 & 85-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO AS AMICI CURIAE SUPPORTING PETITIONERS

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This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Industrial Union Department AFL-CIO ("IUD") with the consent of the parties. The AFL-CIO is a federation of 95 national and inter-

national unions having a total membership of over 13,000,000 working men and women. The IUD is composed of 54 national and international unions having a total membership of approximately 5,000,000 industrial workers.

ARGUMENT

Introduction and Summary

Amici submit this brief for the sole purpose of addressing the question presented by the United States *et al.*, which is also encompassed in the first question presented by Bazemore *et al.* That question is stated by the United States as follows:

> Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs, when such disparities result from a state policy before 1965 of paying blacks lower salaries than whites. [United States' Petition for Certiorari, p. I.] [1]

In addressing this question, we do not enter the vigorous controversy over whether this question is properly presented on this record. See, *e.g.*, Respondents' Brief in Opposition To the Petition of the United States, pp. 6-16. Instead, we assume that the record (and the findings below, insofar as the record evidence is conflicting) establish the following, which we understand to be the factual

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[1] The first question in the *Bazemore* petition is stated as follows:

> Did the court of appeals err in holding that it is both legal and constitutional for a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a timely charge or action. [Petition for Certiorari in No. 85-93, p. i.]

Because we believe the court below erred in its resolution of this Title VII issue, we do not address the constitutional issue raised in the *Bazemore* petition.

predicates for the United States petition's question presented:

1. It was the employer's stated policy and practice, prior to 1965, to pay newly-hired blacks lower initial salaries than those paid whites hired at the same time to do the same job.
2. Within the relevant time period (here, following Congress' extension of Title VII to public employers in 1972), the employer has continued to pay blacks hired prior to 1965 less than whites hired at the same time for doing the same job.
3. That continuing disparity is not due to the intervention of neutral considerations such as a change in the employees' respective job duties, but rather, reflects that the employer simply is presently unwilling to incur the additional cost that would result from paying the blacks at the same level as the whites doing the same job.[2]

On these facts, we believe it is clear that the employer has committed a present violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Our argument proceeds as follows:

In Part I, we show that an employer who initially created a salary disparity between blacks and whites doing the same job because of their races, and who is presently maintaining that disparity because unwilling to spend the additional money that would be required to pay the blacks as much as the whites, is engaged in a present act of race discrimination. It is irrelevant that the employer

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[2] In the instant case, it appears to be common ground that current salaries are determined, at least in part, by decisionmakers in each of 100 counties, so that blacks *and* whites holding the same job are paid differently in different counties. For analytical purposes, we have isolated the paradigmatic case; *viz.*, one in which blacks are currently paid less than whites holding the same job in the same county. We have done so because as the petitioners present the case the current disparaties between blacks and whites are not the product of race-neutral differences in the criteria for salary-determination applied by different counties.

may not presently possess the racial hostility that fueled the creation of the differential; to pay blacks less than whites doing the same job simply to save money is *itself* a discriminatory purpose.

In Part II, we show that the reliance of the court below on *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), is misplaced; in neither of those cases was there a current act of differential treatment undertaken with a discriminatory purpose, as there is here.

In Part III, we suggest that alternative approaches advanced by the petitioners for reversal are more difficult than the approach suggested above, and ought not to be reached. The *Bazemore* petitioners' reliance on a "continuing violation" theory—which we assume is aimed at overcoming the fact that the employer no longer has the racial hostility that originally actuated the salary differential—is unnecessary, for as we have shown the employer's present motive is discriminatory; and it is misleading insofar as it focuses attention on the mere fact of continuity of employment practice rather than on the present basis for that practice. And the United States' reliance on an analogy to the treatment of racially motivated seniority systems should not be considered, because it would unnecessarily require this Court to decide a difficult, unrelated legal issue simply to determine that the analogy is apt, *viz.* whether the limitations principle announced for the NLRA in *Machinists Lodge v. Labor Board*, 362 U.S. 411 (1960), is, as the United States implicitly assumes, inapplicable to Title VII.

I

Plaintiffs' claim in this case is that the employer is intentionally discriminating against black employees in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). That section makes it unlawful for an employer to "discriminate against any individual with

respect to his compensation . . . *because of such individual's race* . . . ." And, of course, to be actionable such discrimination must have occurred within the limitations period established by Title VII, which requires would-be-plaintiffs to file a charge with the Equal Employment Opportunity Commission "within one hundred and eighty days after the alleged unlawful employment practice occurred," § 706(e), 42 U.S.C. § 2000-5(e). Given that limitations period, "the critical question is whether any *present* violation exists," *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) (emphasis added)—whether *at present* (*i.e.*, within 180 days of the filing of the charge) the employer is treating blacks differently than whites "because of" their race.

In the instant case, on the facts we set out at p. 3, *supra*, there is no question that blacks are presently being paid less than whites doing the same job. The determinative question, therefore, is whether race is the *reason* that presently accounts for that differential or whether the employer is acting on race-neutral grounds in fixing the compensation of his employes.

This Court has made clear that where an employer treats black employees less favorably than white employees who are in all relevant respects similarly situated, an intent to discriminate on the basis of race can "be inferred from the mere fact of differences in treatment." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). This is true because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting," and therefore "when all legitimate reasons" for differentiating between employees "have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

In this case, on the facts we have assumed to be established, plaintiffs have shown the type of "difference in treatment" from which it may be inferred that the employer is presently discriminating on the basis of race: plaintiffs have proved that black employees who were hired at the same time as whites presently are being paid less than those whites for performing the same jobs. Moreover, plaintiffs have proved that the pay differential between blacks and whites was *originally* created, prior to 1965, because of race,[3] and that there have been no intervening "neutral" factors (such as changes in the employees' respective job duties) that explain the existence of the differential at present. Unless rebutted, this evidence would provide the most compelling basis for concluding that it is their race that currently explains why blacks are being paid less than whites.

The employer, however, has demonstrated (we have assumed) that the racial animus that initially prompted the salary differential—the blind hostility toward blacks as blacks—no longer obtains, and that the differential has been maintained by the employer out of concern for the "prohibitively costly budgetary alterations," Pet. App. 121a-122a, that would be required to pay blacks hired prior to 1965 the same salary as is paid to whites hired prior to 1965 for doing the same job. But this change in the employer's *reason* for treating blacks and whites differently does not lead to a change in the legal result: *paying blacks less than comparably situated whites in*

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[3] Plaintiffs of course were entitled to introduce evidence showing that the employer had a dual salary scale for black and white hires prior to 1965. This Court has made clear that evidence of a "discriminatory act which occurred before the statute was passed . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Air Lines v. Evans, supra,* 431 U.S. at 558.

order to save money is itself a present act of discrimination on the basis of race.[4]

The financial burden of paying blacks the same as whites is no more a "neutral" explanation for continuing an existing pay disparity than it would be for creating a new one by paying blacks hired today less than similarly-situated whites hired today. It may well be that social forces make it possible to attract or retain black employees at lower salaries than whites (because, for example, blacks have fewer job opportunities elsewhere), but that surely cannot serve as a justification for paying blacks less than whites to do the same job. To permit such a defense would render Title VII's ban on compensation discrimination a nullity. This Court noted in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-717 (1978), that "neither Congress nor the courts have recognized" a "cost-justification defense" under Title VII to liability for deliberately treating women less favorably than men. The same surely is true as to race discrimination.[5] See also, *Corning Glass Works*

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[4] Because the consideration in text is dispositive, we relegate to a footnote the observation that in the context of this case a professed concern for "prohibitively costly budgetary alterations" can not survive scrutiny. The employer has not held the salaries of its employees constant but has instead periodically raised those salaries. The employer has thus chosen to increase the salaries of white employees rather than aplying those same revenues to raising blacks' salaries to the level of the whites'. And if the response is that the employer feared whites would quit unless furnished those increases, whereas equalization was not necessary to induce blacks to remain, that is merely confirmation that present social conditions enable the employer to discriminate on the basis of race.

[5] As this Court has established, the fact that an employer may have been actuated not by racial or gender-based hostility but by self-interest or even by some altruistic consideration is not a defense under § 703(a)(1) to treating blacks differently from whites or men or women. See, for example, *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-85 (1983); *Manhart*, 435 U.S. at 709.

v. Brennan, 417 U.S. 188, 205 (1974) (Congress did not intend the availability of women at lower wages to constitute a justification for paying unequal wages for equal work under the Equal Pay Act.) Thus, the employer's invocation of budgetary considerations is not a non-discriminatory basis for the pay differential; it is merely an explanation of why the employer is presently discriminating on the basis of race.[6]

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[6] While the analysis in text is sufficient to dispose of the instant case, we wish to note our disagreement with the suggestion in the United States petition (at p. 18, n.20) that pay discrimination under Title VII cannot be proved circumstantially from the fact that blacks are paid less than comparably situated whites but can be proved only by some more direct form of evidence of discriminatory intent. Such a notion conflicts with the uniform approach of this Court.

As this Court has recognized, "[t]here will seldom be 'eyewitness' testimony" as to the employer's basis for differentiating between employees. *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983). Consequently, "[a]s in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence," and the courts are to "consider all the evidence, giving it whatever weight and credence it deserves"; indeed it is error to require a Title VII plaintiff to submit direct evidence of discriminatory intent because it is a "general principle that any Title VII plaintiff [may] carry the initial burden of offering evidence adequate to create an *inference* that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters v. United States, supra*, 431 U.S. at 358 (emphasis added.)

This lesson is fully applicable in the context of claims of discrimination in compensation. Where blacks show that they are paid less than similarly-situated whites, and negate "the most common non-discriminatory reasons" for the differential, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), that proof raises an inference of discrimination for the very reason such inferences have been drawn in other Title VII cases: that discrimination between comparably-situated blacks and whites, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577. In such a case, if the employer proffers no innocent explanation for the differential, or proffers an explanation that is found to be pretextual, the plaintiff is en-

II

The court below believed that this Court's holdings in *United Air Lines v. Evans*, *supra*, and *Hazelwood School District v. United States*, 433 U.S. 299 (1977) compel the conclusion that Title VII does not render the current wage disparity between whites and blacks unlawful. That belief is erroneous.

In *Evans*, the Court held that an employer did not violate Title VII by applying to the respondent employee its uniform rule—regularly applied to men and women alike—that employees who are discharged and later rehired are treated as new employees for all purposes and accorded no credit for their prior service. The plaintiff contended that the rule was discriminatory as applied to her, because her discharge several years before had been discriminatorily motivated. This Court held that a challenge to the discharge was time-barred, and accordingly the discharge was "an unfortunate event in history which has no present legal consequences," 431 U.S. at 558. Plaintiff's status thus was no different than that of any other employee discharged and later rehired. And plaintiff did not allege, let lone prove, that the employer discriminated on the basis of sex as between such employees:

> Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex. [*Id.* at 557-558.]

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titled to prevail. *Burdine*, 450 U.S. at 254; *Aikens*, 460 U.S. at 714. It is our view, accordingly, that plaintiffs could have prevailed in the instant case even had they not introduced evidence of the pre-1965 discriminatory salary practices (assuming the facts to be those we set out at p. 3, *supra*, in all other respects).

By contrast, the claim in the instant case is precisely that the employer's current pay practice "treats existing [black] employees differently from existing [white] employees" and "differentiates between similarly situated [blacks and whites] on the basis of [race]." Here, plaintiffs do not seek to infuse a facially neutral practice, not itself unlawful, with illegality by reference to a time-barred or pre-Act wrong. Rather here, the present practice under attack—paying black employees less than white employees doing the same job—is not "neutral in its operation," *id.* at 558, and plaintiffs have shown that the employer has maintained this race-skewed differential with discriminatory intent (pp. 6-7, *supra*).

In *Hazelwood*, the issue was whether the employer, a public school district, had engaged in a pattern or practice of race discrimination in the hiring decisions made after Title VII became applicable to public employers. The plaintiff sought to establish such a pattern or practice by introducing statistics showing that the present racial composition of the employer's workforce did not reflect the racial composition of the workforce from which the employer hired. In the passage of the *Hazelwood* opinion that the court below thought significant for the instant case, this Court discussed the weight to be accorded such evidence:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. *A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.* For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical workforce disparities,

> the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U.S., at 360. [453 U.S. at 309-310, emphasis added, footnote omitted.]

The court below believed that the sentence in *Hazelwood* italicized above (quoted, 751 F.2d at 760) dictated the resolution of this case. But the difference between that case and this is self-evident. An employer who had followed a discriminatory hiring policy prior to Title VII's effective date and who embarked on a nondiscriminatory hiring policy on that date would have done nothing that could constitute a violation of Title VII. In contrast, the employer in the instant case has, subsequent to the effective date of the Act, repeatedly paid blacks less than similarly-situated whites for performing the same work—indeed, has done so every payday. What is more, the employer in the instant case has periodically reevaluated and adjusted its payscale subsequent to the effective date of the Act, and each time, without having any nondiscriminatory reason for so doing, has settled upon a payscale that contains a disparity between black's wages and the wages of whites doing the same job. And, as shown, the basis for that current disparity is the race of the employees. Thus, unlike the hypothesized employer in *Hazelwood* whose current practices were "wholly nondiscriminatory," the practice of the employer here is not. And it is this current, discriminatory practice that is at issue here.

III

What we have said to this point represents, we believe, the proper analytical approach to the disposition of the question presented. Petitioners have advanced alternative approaches that we believe do not provide a sound basis for resolving that question.

A. The *Bazemore* petitioners have analyzed the question in terms of whether there is here a "continuing" violation (*Bazemore* Pet. at 17-24). We believe that label misfocuses analysis, and should be avoided.

Plaintiffs' effort has been undertaken, we assume, to counter the employer's claim that while the pay differential was originally created for reasons of racial animus, the differential has been maintained in the relevant time period for "economic" reasons, *i.e.*, the financial burden of paying blacks and whites the same salaries. As we have shown, pp. 6-7, *supra*, the current practice is illegal if that is the employer's rationale, for even on that rationale the employer is presently treating blacks differently than similarly situated whites because of their race. If, however, the employee had a *lawful* basis, unrelated to race, for the current pay differential, there would not be a violation simply because the practice (as distinct from the motive actuating it) was "continuing." Consequently, "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *United Air Lines v. Evans*, *supra*, 431 U.S. at 558 (emphasis in original).[7]

B. The United States has suggested that the correct answer to this case can be derived by analogy to the

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[7] If an employer is found to have engaged in a present violation, at the remedy stage of the case it may become necessary to determine whether that violation is "continuing." This is because of the conjunction of section 703(e), which requires that a Title VII charge be filed within 180 days of the act complained of, and section 706(g), which authorizes an award of backpay for two years prior to the filing of the charge. It is unlikely that Congress intended that if *one* wrongful act is timely challenged the employee can recover backpay for *unrelated* wrongs committed by the employer that were not themselves the subpect of a timely change. If, as seems likelier, Congress intended to provide a remedy for acts prior to the relevant time period only for earlier injuries resulting from a course of conduct that continued into the relevant time period, it becomes necessary for that purpose to distinguish between violations that have been "continuing" and those that have not. Indeed, in a disparate pay case such as that presented here, once it is determined that a current (*i.e.*, timely challenged) violation has been committed, the *Bazemore* petitioners' analysis would surely demonstrate that backpay is authorized for two years prior to the filing of the charge.

treatment of "intentionally discriminatory seniority system[s]":

> [J]ust as an intentionally discriminatory seniority system, even one that was adopted before the Act became effective, is unlawful (*Pullman-Standard v. Swint*, 456 U.S. 273, 276-277 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982)), so that it affords no justification for current employment practices that have a race-based effect, so the courts of appeals have correctly recognized that an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect [U.S. Pet. at 18].

But the two practices that the United States would compare are conceptually different, and require different analyses for their resolution; indeed, the seniority case is by far the harder of the two and, contrary to the assertion of the United States, it has not been resolved by this Court.

The cases cited by the United States stand for the proposition that discriminatorily motivated seniority systems do not enjoy the protection accorded by § 703(h) to bona fide seniority systems. And in *Swint*, the Court addressed on its merits, without suggesting that there might be a timeliness problem, a claim that a seniority system was unlawful because allegedly negotiated in 1954 with discriminatory intent. But the question whether such systems are indefinitely subject to challenge was not presented in those cases, for no challenge to the timeliness of the plaintiffs' claims was asserted. And resolution of that timeliness question turns upon a consideration not present in the instant case: whether a practice that is *neutral* on its face, and that is not shown to have been *maintained* in the relevant time period for discriminatory reasons, may be challenged *solely* on the ground that the practice was initially *adopted* (in a time-barred period) with discriminatory motive. This Court

has not addressed that question under Title VII, but the identical question has been answered by this Court under the National Labor Relations Act in a manner contrary to the United States' position.

In *Machinists Local v. Labor Board*, 362 U.S. 411 (1960), the Court addressed the timeliness of a challenge to the maintenance of a collective bargaining agreement that was alleged to be unlawful because adopted at a time when the union did not represent a majority of the employees. Under existing Board law, which the Court assumed to be correct, "the continued enforcement, as well as the execution, of this collective bargaining agreement constituted an unfair labor practice, and . . . these are two logically separate violations, independent in the sense that they can be described in discrete terms." 362 U.S. at 422. Nevertheless, the Court held that in light of the NLRA's six-month time limit for filing charges (Section 10(b), 29 U.S.C. § 160(b)), "the enforcement . . . of such an agreement as this constitutes a *suable* unfair labor practice only for six months following the making of the agreement." 362 U.S. at 423 (emphasis in Court's opinion.)[8] The Court, noting that a contrary holding "would mean that the statute of limitations would never run in a case of this kind," *id.* at 416, reasoned as follows:

> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we

[8] See also, *id.* at 422: "a finding of violation which is *inescapably* grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso" (emphasis added, footnote omitted). The Court also held, of course, that the *execution* of the agreement could be challenged as an unfair labor practice only within six months of the date of execution, *id.* at 415, 419.

> think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . . and of course to stabilize existing bargaining relationships. [*Id.* at 419, footnote omitted.] [9]

The *Machinists Local* Court was careful to distinguish the case at hand from two hypothetical cases:

> [T]he vice in the enforcement of this agreement is not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validity executed but unlawfully administered. [*Id.* at 423.]

The instant case involves a pay practice that is "invalid on its face," and that is being maintained currently for a reason that is not permissible under Title VII. There is thus no occasion here to decide whether the analysis of *Machinists Local* is applicable under Title VII, or whether the contrary analysis implicit in the government's attempted analogy should apply under Title VII.

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[9] In *Machinists Local*, the agreement was executed subsequent to the enactment of the NLRA. We assume, however, that the Court would have held a challenge to the post-Act enforcement of an agreement executed with a minority union prior to the effective date of the Act to be actionable if filed within six months of the Act's effective date. For like reasons, if the holding of *Machinists Local* were applicable to Title VII, we assume that facially neutral seniority systems negotiated with discriminatory intent prior to the effective date of Title VII were subject to challenge promptly—within the length of the limitations period—after Title VII became effective.

CONCLUSION

For the reasons set forth above, the decision below on the question presented by the United States petitioners and the first question presented by the *Bazemore* petitioners should be reversed.

Respectfully submitted,

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